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No. 89-1283

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ARCADIA, OHIO, *et al.*,
Petitioners,

v.

OHIO POWER COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether Section 318 of the Federal Power Act preserves the Federal Energy Regulatory Commission's authority over rate matters unless there is an actual conflict in the obligations of an electric utility created by a requirement imposed by the FERC and a requirement imposed by the Public Utility Holding Company Act or by the Securities and Exchange Commission acting pursuant to PUHCA.

2. Whether the FERC is entitled to judicial deference in interpreting Section 318 of the Federal Power Act, a provision within the Commission's organic statute, even though that particular section of the Act concerns the FERC's jurisdiction.

LIST OF PARTIES

A list of parties was provided at page ii of the petition for certiorari.

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BRIEF OF PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 880 F.2d 1400 (D.C. Cir. 1989). The decision of the Federal Energy Regulatory Commission (FERC) (Pet. App. 31a-67a) is reported at 39 FERC ¶ 61,098 (1987). The decision of the FERC denying rehearing (Pet. App. 68a-73a) is reported at 42 FERC ¶ 61,046 (1988).

JURISDICTION

The court of appeals rendered its judgment July 28, 1989. Rehearing was denied October 12, 1989. See Pet. App. 29a-30a. The petition for a writ of certiorari was filed February 9, 1990, and was granted March 26, 1990. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 318 of the Federal Power Act of 1935 (FPA) provides in relevant part:

> **Conflict of Jurisdiction.** If, with respect to the issue, sale, or guaranty of a security, or assumption of obligation or liability in respect of a security, the method of keeping accounts, the filing of reports or the acquisition or disposition of any security, capital assets, facilities, or any other subject matter, any person is subject both to a requirement of the Public Utility Holding Company Act of 1935 or of a rule, regulation, or order thereunder and to a requirement of this chapter or of a rule, regulation, or order thereunder, the requirement of the Public Utility Holding Company Act of 1935 shall apply to such person, and such person shall not be subject to the requirement of this chapter, or of any rule, regulation, or order thereunder, with respect to the same subject matter, unless the Securities and Exchange Commission has exempted such person from such requirement of the Public Utility Holding Company Act of 1935, in which case the requirements of this chapter shall apply to such person. 16 U.S.C. § 825q.

Section 205(a) of the FPA provides in relevant part:

> All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful. 16 U.S.C. § 824d(a).

Section 206(a) of the FPA provides in relevant part:

> Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. 16 U.S.C. § 824e(a).

Section 13(b) of the Public Utility Holding Company Act (PUHCA) provides in relevant part:

> After April 1, 1936, it shall be unlawful for any subsidiary company of any registered holding company or for any mutual service company, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to enter into or take any step in the performance of any service, sales or construction contract by which such company undertakes to perform services or construction work for, or sell goods to, any associate company thereof except in accordance with such terms and conditions and subject to such limitations and prohibitions as the Commission by rules and regulations or order shall prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers and to insure that such contracts are performed economically and efficiently for the benefit of such associate companies at cost, fairly and equitably allocated among such companies. 15 U.S.C. § 79m(b).

STATEMENT

Petitioners are fifteen small Ohio villages and cities that purchase wholesale electric power from respondent Ohio Power Company for resale to their residents.[1] Ohio Power is owned by a registered public utility holding company, the American Electric Power Company

[1] Petitioners include the Villages of Arcadia, Bloomdale, Carey, Cygnet, Deshler, Greenwich, Ohio City, Plymouth, Republic, Shiloh, Sycamore, and Wharton, and the Cities of Bryan, St. Clairsville, and Wapakoneta. Petitioners have populations ranging from approximately 300 to 8500.

(AEP). The principal element of Ohio Power's operating expenses is coal, which it purchases under contract from its own wholly-owned subsidiary, the Southern Ohio Coal Company (SOCCO). The Federal Energy Regulatory Commission (FERC) has found the coal prices paid by Ohio Power under that contract to be substantially in excess of market prices. The FERC held that Ohio Power could not pass those inflated costs on to its wholesale customers, including petitioners, in its electric rates. The principal question in this case is whether, under Section 318 of the Federal Power Act (FPA), the jurisdiction of the Securities and Exchange Commission (SEC) over the transactions between Ohio Power and SOCCO deprives the FERC of its authority to hold that Ohio Power's rates are unjust and unreasonable because its coal costs are excessive.

1. *The Regulatory Context.* At the heart of this dispute is the comprehensive dual system of federal utility regulation created by Congress in the Public Utility Act of 1935. Title I of that Act, also known as the Public Utility Holding Company Act of 1935 (PUHCA), gives the SEC jurisdiction over certain transactions among registered public utility holding companies and their subsidiaries and affiliates, including public utility operating companies. Title II of the Act, also known as the Federal Power Act (FPA), grants the FERC (as successor to the Federal Power Commission (FPC) (see 42 U.S.C. §§ 7172(a)(1)(B), 7293)) jurisdiction over the transmission and sale at wholesale of electric power in interstate commerce, including the interstate transmission and sale of electric power by public utilities that are owned by holding companies. See FPA § 201(b), 16 U.S.C. § 824(b). Thus, under the statutory scheme of the Public Utility Act, the SEC and the FERC have dual jurisdiction over certain activities of public utilities owned by holding companies.

Because Ohio Power sells electricity at wholesale in interstate commerce, it is subject to regulation by the

FERC under the FPA. FPA § 201(b)(1), 16 U.S.C. § 824(b)(1). Section 201(a) of the FPA declares that "Federal regulation of . . . the *sale* of [electric] energy at wholesale in interstate commerce is necessary in the public interest." 16 U.S.C. § 824(a) (emphasis added). Accordingly, the FPA vests broad and comprehensive ratemaking authority in the FERC. Section 205(a) contains the classic "just and reasonable" standard of ratemaking: "All rates and charges . . . for or in connection with the . . . sale of electric energy subject to the jurisdiction of the [FERC] . . . shall be just and reasonable." 16 U.S.C. § 824d(a). Section 206(a) grants the FERC broad authority to set rates in accordance with this standard, and also to determine whether "any . . . contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential" and, if so, to abrogate or modify that contract. 16 U.S.C. § 824e(a). To protect the FERC's ability to ensure just and reasonable rates, the FPA also grants the FERC authority over accounting and record-keeping (FPA § 301(a), 16 U.S.C. § 825); major transactions, such as the sale or disposition of utility facilities (FPA § 203(a), 16 U.S.C. § 824b); major financing transactions, including issuance of securities, guarantees, and assumptions of liabilities (FPA § 204(a), 16 U.S.C. § 824c(a)); and interlocking directorates (FPA § 305(b), 16 U.S.C. § 825d(b)).

Because it is part of a registered public utility holding company system, Ohio Power, along with AEP itself and all other direct and indirect subsidiaries of AEP, is also subject to regulation by the SEC under PUHCA. PUHCA's purpose was to "meet the problems and eliminate the evils . . . connected with public-utility holding companies." PUHCA § 1(c), 15 U.S.C. § 79a(c). Many of PUHCA's provisions are designed primarily to regulate the finances, management and capitalization of public utility holding companies and their subsidiaries to protect both investors and consumers. Accordingly,

the SEC has authority over, among other things, the issuance and sale of securities (PUHCA § 7, 15 U.S.C. § 79g); acquisitions of securities or utility assets (PUHCA § 10, 15 U.S.C. § 79j); the filing of reports (PUHCA § 14, 15 U.S.C. § 79n); certain financing transactions involving the extension of credit (PUHCA § 12, 15 U.S.C. § 79l); accounting and recordkeeping (PUHCA § 15, 15 U.S.C. § 79o); and interlocking directorates (PUHCA § 17(c), 15 U.S.C. § 79q(c)).

Section 13(b) of PUHCA authorizes the SEC to regulate contracts among subsidiaries of public utility holding companies. 15 U.S.C. § 79m. It was designed to avoid "excessive charges" incurred as a result of inter-affiliate contracts. PUHCA § 1(b)(2), 15 U.S.C. § 79a(b)(2). Indeed, such contracts are prohibited unless they comply with "such limitations and prohibitions as the [SEC] by rules and regulations or order shall prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers." 15 U.S.C. § 79m. In promulgating these regulations, the SEC is "to insure that such contracts are performed economically and efficiently for the benefit of such associate companies at cost, and fairly and equitably allocated among such companies." *Id.* SEC Rule 90 incorporates the "at cost" criterion of Section 13(b) by prohibiting sales and service contracts "at *more* than cost." 17 C.F.R. § 250.90(a)(2) (1989) (emphasis added).[2] In contrast to the FERC's responsibility under the FPA to ensure that rates (including the costs to be passed on to the customer) are "just and reasonable," the SEC has no responsibility or authority to ensure that the costs passed on to consumers are "just and reasonable."

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[2] Rule 90 also provides, however, that the sale of seller-produced goods need not be limited to cost (17 C.F.R. § 250.90(d)(2)), and Rule 92 provides that contracts for seller-produced goods cannot exceed "the price at which the purchaser might reasonably be expected to obtain comparable goods elsewhere," 17 C.F.R. § 250.92(b).

Because of the overlapping authority granted to the SEC under PUHCA and to the FERC under the FPA, Congress provided in Section 318 of the FPA a mechanism for resolving conflicts between these two regulatory regimes. The precise scope of that provision is the principal issue presented in this case.

2. *The Coal Contract Between Ohio Power And SOCCO.* This dispute arises as a result of a contract between Ohio Power and its wholly-owned subsidiary, SOCCO, under which Ohio Power purchases coal for generating electricity. See J.A. 97. Coal costs are the dominant component in the total cost of producing electricity from coal-fueled generators. In this case, for example, coal costs account for nearly half of Ohio Power's charges for electric sales to petitioners. See Ohio Power Co., Revised Compliance Filing, Docket No. ER82-553-004 (FERC Apr. 24, 1989).

PUHCA does not require the SEC to review and approve the Ohio Power-SOCCO contract, nor has the SEC done so. Ohio Power and SOCCO, however, have engaged in certain capitalization transactions that required and received SEC approval. Each time, the SEC issued a perfunctory order approving the financing transaction and incorporating or paraphrasing certain language concerning coal costs from the application. In 1971, the SEC issued an order approving the sale and purchase of SOCCO's stock. The order stated that the charges for coal under the Ohio Power-SOCCO contract would be "based on" actual costs. *Ohio Power Co.*, HCAR No. 17383 (Dec. 2, 1971) (J.A. 76). The next order, issued in 1978, authorized further investment by Ohio Power in SOCCO. It indicated that the price of coal "will not exceed the cost thereof to the seller." *Ohio Power Co.*, HCAR No. 20515 (Apr. 24, 1978), 14 S.E.C. Docket 928, 929 (J.A. 79). Subsequently, in 1979, the SEC entered an order noting that Ohio Power would pay *less* than the actual cost of coal if its after-tax capital costs exceeded a certain level. *Southern Ohio Coal*

Co., HCAR No. 21008 (Apr. 17, 1979) (J.A. 85). The most recent order, however, recited that "[t]he price at which SOCCO's coal will be sold to AEP system companies will not exceed the cost thereof to the seller." *Southern Ohio Coal Co.*, HCAR No. 21537 (Apr. 25, 1980) (J.A. 93).

None of these statements purported to require Ohio Power to purchase coal from SOCCO, or to pay any particular price for SOCCO's coal. Nor did they mention Section 13(b) of PUHCA. Most important, none of the orders contained any finding that the costs to be incurred under the SOCCO contract were "just and reasonable" from the standpoint of Ohio Power's customers, or on any other basis.

3. *Proceedings Before The FERC.* Ohio Power filed rate increases for its wholesale service to petitioners on May 28, 1982. Pet. App. 32a. The FERC initiated a rate proceeding pursuant to Sections 205 and 206 of the FPA. After all other issues had been settled, the only remaining issue was the reasonableness of the captive coal costs Ohio Power sought to recover from its customers.

Acting under its mandate under Section 206 of the FPA to protect ratepayers from excessive charges, the FERC disallowed the portion of Ohio Power's coal costs that did not satisfy the FERC's "comparable market test." See *Public Serv. Co. of New Mexico*, 17 FERC ¶ 61,123 (1981), *aff'd sub nom. Public Serv. Co. of New Mexico* v. *FERC*, 832 F.2d 1201 (10th Cir. 1987). Under that test, utilities that purchase coal from affiliates may "recover no more from their rate-payers than the price that would have been incurred if a comparable coal supply contract had been made with a non-affiliated supplier." 17 FERC at 61,246. The FERC adopted the comparable market test for two reasons: First, in the FERC's judgment, "a market-price limitation on fuel expense recovery from affiliated suppliers provides the best incentive for utilities to develop the least costly sources

of fuel." Pet. App. 42a. Second, that limitation protects consumers from the risk of "self-dealing" and "rate manipulation" that "arise[] in transactions between affiliates." *Id.* at 42a-43a.

The FERC found that Ohio Power had paid to its captive coal subsidiary approximately 50 percent more than the market price in 1980, approximately 94 percent more than the market price in 1981, and approximately 24 to 33 percent more during the period from 1982 to 1986. Pet. App. 44a-45a, 58a-59a & n.87. Accordingly, the FERC ordered Ohio Power to establish rates calculated to recover from its customers no more than the comparable market price. Pet. App. 65a-67a. The FERC also ordered Ohio Power to refund prior illegal overcharges of approximately $10 million to its wholesale customers, which those customers may be required to repay if the decision below is affirmed. See Pet. App. 66a; Ohio Power Co., Revised Compliance Filing, Docket No. ER82-553-004 (FERC Apr. 24, 1989).

Ohio Power contended that, under Section 318, the FERC has no jurisdiction over the coal charges Ohio Power passes on to its customers. Ohio Power argued it is required by Section 13(b) of PUHCA and SEC orders to pay to SOCCO the "costs" of producing coal from SOCCO's mine, including salaries and a return on investment, regardless of whether those costs were above comparable market prices. Ohio Power further argued that the SEC's regulation of the "subject matter" of coal contracts ousts the FERC of all jurisdiction to regulate the coal charges embodied in Ohio Power's wholesale electric rates.

The FERC rejected this interpretation of Section 318. The FERC found that Section 318 ousts it of jurisdiction over a particular subject matter only if a requirement imposed under PUHCA actually conflicts with a requirement imposed under the FPA. Pet. App. 34a-37a. The FERC concluded that, based upon its analysis of the relevant SEC rules and orders, "it appears . . .

the SEC [does] not require a cost-based price for the subsidiary coal." Pet. App. 37a. Indeed, the FERC also noted that "the SEC may require a market-based price for subsidiary coal if the market price is lower than cost." Pet. App. 37a.[3] The FERC therefore concluded that there was "no conflict in the regulation by the SEC and the regulation by this Commission" and hence, that Section 318 did not apply. Pet. App. 37a-38a.

4. *The Court Of Appeals' Decision.* A divided court of appeals reversed. The court did not dispute the FERC's conclusion that its comparable market test is necessary to protect consumers against self-dealing and rate manipulation arising from inter-affiliate transactions. Nor did the court dispute the FERC's findings that, during each year from 1981 to 1986, Ohio Power paid its captive coal subsidiary between 24 percent and 94 percent more than comparable market prices, and that Ohio Power had passed those inflated costs on to its customers. Nor did the court dispute the FERC's determination that the SEC does not regulate the fuel charges that are passed on to customers of a public utility subject to PUHCA, and that there is therefore no actual conflict between the SEC's exercise of its jurisdiction under PUHCA and the FERC's exercise of jurisdiction under the FPA. Instead, the panel majority agreed with Ohio Power that Section 318 completely deprives the FERC of its authority to regulate the fuel charges that a public utility purchasing fuel from an affiliated company may pass along to consumers in wholesale rates.

[3] Alternatively, the FERC observed that the SEC does not regulate rates, as the SEC itself has repeatedly acknowledged. Pet. App. 37a-40a. Accordingly, the FERC held that for purposes of Section 318 the relevant "subject matter" of SEC regulation under PUHCA in this case was the transfer price of coal between SOCCO and Ohio Power, not the "fuel costs Ohio Power may collect from its wholesale customers." Pet. App. 37a. According to the FERC, "setting the intra-corporate price and setting rates are not the same subject matter which would bring section 318 into play." *Id.*

In reaching that conclusion, the majority first held that the FERC is not entitled to any deference in its interpretation of Section 318 of the Federal Power Act. The majority acknowledged that *Chevron, USA, Inc.* v. *NRDC*, 467 U.S. 837 (1984), and other decisions of this Court require a reviewing court to defer to " 'an agency's construction of the statute which it administers.' " Pet. App. 8a (quoting *Chevron*, *supra*, 467 U.S. at 842). The majority held, however, that "Section 318 cannot be said to be entrusted to the FERC's administration" because that provision "involves" the FERC "only to the extent of FERC's interface with regulation of the regulated entities by the SEC under PUHCA." Pet. App. 8a. Therefore, according to the majority, the rule requiring deference to an agency's statutory interpretation does not apply.

Interpreting the statute *de novo*, the court rejected the FERC's interpretation of Section 318. The court of appeals held that the FERC's interpretation "proceeds from a false premise that the bar of section 318 applies only where there is a present conflict between SEC and FERC prescriptions." Pet. App. 14a. According to the court, Section 318 "bars FERC jurisdiction whenever a person is 'subject . . . to a requirement' " imposed under PUHCA. *Id.* Because Ohio Power is "subject to Section 13(b) with respect to its contractual relations with SOCCO," it is irrelevant whether any conflict exists between requirements imposed under the two statutory schemes. *Id.* According to the court, "[i]t is sufficient for present purposes that the SEC is charged by the statute with regulating the terms of affiliate contracts." Pet. App. 11a.[4]

Judge Mikva dissented from this part of the majority's opinion. He would have held that Section 318 does not grant the SEC exclusive jurisdiction over all costs aris-

[4] The court also rejected the FERC's interpretation of the phrase "subject matter" in Section 318. Pet. App. 9a-10a.

ing from a PUHCA-regulated contract. Instead, Section 318 grants the SEC paramount authority in the event there is an actual regulatory "conflict" between an SEC requirement and any action taken by the FERC. Pet. App. 19a-20a. Judge Mikva also observed that the SEC orders and regulations merely established a ceiling price, and that the FERC's decision not to allow all of SOCCO's "costs" to be passed on to customers merely requires Ohio Power to pass on an amount below the specified ceiling. Pet. App. 21a-23a. Thus, Ohio Power could comply with both requirements, and thereby fulfill the purposes of both statutes. Accordingly, Judge Mikva concluded that there was no conflict in the requirements imposed upon Ohio Power that would warrant depriving the FERC of its ratemaking authority. Pet. App. 23a.[5]

The court of appeals denied rehearing. Pet. App. 29a. Judge Mikva issued a statement urging rehearing because "the panel opinion creates a regulatory gap that can be mischievous in future cases" in "this important and delicate area of inter-agency administration of the law." Pet. App. 30a. As Judge Mikva explained, "[t]he statutory interpretation engaged in by the majority . . . generates a no-man's land where neither the [SEC] nor FERC will patrol holding company practices which can oppress consumers, investors and the public." *Id.*

This Court granted certiorari on March 26, 1990.

[5] Judge Mikva ultimately concurred in the decision to set aside the FERC's order. In his view, a FERC rule, 18 C.F.R. § 35.14(a)(7), requires the FERC to accept for ratemaking purposes fuel prices that are subject to the jurisdiction of the SEC. That rule provides that such costs "shall be deemed to be reasonable" for ratemaking purposes. 18 C.F.R. § 35.14(a)(7) (1989). In its decision, the FERC had held that this language merely "creates a *presumption* of reasonableness, not a conclusive finding of reasonableness" Pet. App. 41a (emphasis added). Judge Mikva, however, disagreed with the FERC's interpretation of its regulation, and held that the regulation's language creates a conclusive presumption. Pet. App. 27a-28a. The majority expressed no opinion on this issue.

SUMMARY OF ARGUMENT

1. On its face, the Public Utility Act grants regulatory authority to *both* the SEC and the FERC over a number of matters affecting public utilities owned by holding companies, including inter-affiliate contracts. The core question in this case—the meaning of Section 318 of the FPA—turns on whether Congress granted the SEC exclusive jurisdiction over those matters or, alternatively, whether it granted concurrent authority to the SEC and the FERC *except* when the exercise of their respective authority creates an actual conflict by imposing inconsistent obligations on a regulated utility.

Contrary to the court of appeals' reading, the language of Section 318 demonstrates Congress' intent to create a scheme of concurrent, rather than exclusive, federal regulatory authority. Section 318, which is entitled "*Conflict* of jurisdiction," ousts the FERC of jurisdiction only when the same "person" is subject to "requirements" imposed under both PUHCA and the FPA "with respect to the same subject matter." Section 318 therefore stands in marked contrast to Section 204(f) of the FPA, which exempts from the FERC's authority over securities issues "a public utility organized and operating in a State under the laws of which its securities issues are *regulated by* a State Commission." 16 U.S.C. § 824c(f) (emphasis added). If Congress had intended to make SEC regulation exclusive whenever it overlaps with jurisdiction conferred on the FERC, Congress plainly knew how to do so and would have used language similar to Section 204(f). The court of appeals' interpretation, moreover, reads the term "requirement" out of Section 318. That interpretation was also rejected by this Court's decision in *Northwestern Elec. Co.* v. *FPC*, 321 U.S. 119, 122 (1944), which upheld accounting regulations of the FPC because "no conflict exist[ed]" with PUHCA or with SEC orders.

The legislative history confirms this plain meaning. The Senate report on Section 318, for example, stated

that "in the case of *conflict* between the provisions of the Federal Power Act and [PUHCA], the *requirements* of the latter act shall apply. . . ." S. Rep. No. 621, 74th Cong., 1st Sess. 54 (1935) (emphasis added).

The structure of the Public Utility Act also points decisively to a system of dual, complementary regulation that is fundamentally inconsistent with the court of appeals' vision of exclusive SEC authority. That Act "had two primary and related purposes," corresponding to the regulatory responsibilities of two separate federal agencies: "to curb abusive practices of public utility companies by bringing them under effective control [of the SEC], and to provide effective federal regulation [by the FERC] of the expanding business of transmitting and selling electric power in interstate commerce." *Gulf States Utilities Co.* v. *FPC*, 411 U.S. 747, 758 (1973). Consistent with this scheme, Congress specifically considered and rejected a proposal that would have required the SEC to act as a ratemaking body with respect to contracts between affiliated companies. See 79 Cong. Rec. 10,838 (1935); H.R. Conf. Rep. 1903, 74th Cong., 1st Sess. 72 (1935).

Moreover, because the responsibility—and the tools—for ratemaking review were lodged with the FERC rather than the SEC, the court of appeals' interpretation of Section 318 creates a severe gap in the comprehensive federal regulatory scheme Congress created. Granting the SEC exclusive jurisdiction over the "subject matters" enumerated in Section 318 deprives the FERC of any ability to regulate accounting methods and reports that are essential to its ratemaking responsibilities, or to have any say in such matters as sales of utility assets. That interpretation also effectively eliminates any FERC review of the costs incurred in connection with an inter-affiliate contract to determine whether they are "just and reasonable."

2. Even if Congress' intent were not clear, the court of appeals should have deferred to the FERC's interpretation that Section 318 requires an actual conflict. When Congress' intent is not clear, this Court's decisions require an agency's interpretation of its own organic statute to be accepted by the courts as long as that interpretation is "reasonable." *E.g.*, *Chevron, USA, Inc.* v. *NRDC*, 467 U.S. 837, 845 (1984). Because it is part of a statute (the Federal Power Act) administered by the FERC, Section 318 falls squarely within that rule. The fact that Section 318 deals with the FERC's own authority does not undermine the rationale for judicial deference. Indeed, this Court has applied the *Chevron* rule to other jurisdictional provisions. *E.g.*, *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833 (1986). Similarly, it is immaterial that Section 318 implicates the authority of the SEC as well as that of the FERC, because in this case both agencies agree that Section 318 requires an actual conflict.

3. No actual conflict exists here for at least two independent reasons. First, as the FERC itself concluded, nothing in PUHCA, the SEC regulations, or the relevant orders *requires* Ohio Power to pay to SOCCO the actual costs of SOCCO's coal. Indeed, nothing in those provisions requires Ohio Power to take any coal from SOCCO at all. On their face, moreover, the SEC's regulations merely establish an upper limit on the price SOCCO may charge. It would be absurd to interpret PUHCA or the SEC regulations to prevent Ohio Power from paying *less* than the "costs" incurred by Ohio Power's wholly-owned subsidiary, particularly when those "costs" are substantially above the market price.

Second, even if something in PUHCA or in the SEC's regulations or orders could be construed to require Ohio Power to take coal from SOCCO, and to pay to SOCCO an amount equal to SOCCO's "costs," that requirement is not in "actual conflict" with the FERC's determi-

nation that the full amount of those "costs" cannot be passed on to Ohio Power's customers. Ohio Power, in short, can absorb the difference. Compliance with both requirements will reduce Ohio Power's profits, but it is not "a physical impossibility." *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 204 (1983).

4. Finally, the court of appeals' decision cannot be affirmed on the alternative ground that Section 35.14(a)(7) of the FERC's own regulations prohibits the FERC from imposing market-price restrictions on wholesale rates. The FERC's interpretation of its own regulation is entitled to the highest deference and must be accepted by a reviewing court as long as it is reasonable. *E.g., Jewett* v. *Commissioner*, 455 U.S. 305, 318 (1982); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965). The FERC's interpretation of its regulation, as creating a rebuttable, rather than a conclusive, presumption, easily satisfies that requirement. *E.g., Lavine* v. *Milne*, 424 U.S. 577 (1976).

ARGUMENT

In *Chevron, USA, Inc.* v. *NRDC*, 467 U.S. 837 (1984), this Court articulated the now-familiar framework for judicial review of an agency decision interpreting its organic statute. First, the court determines whether "Congress has directly spoken to the precise question at issue." *Id.* at 842. If Congress' intent is not clear, the court then determines whether the agency's interpretation is reasonable. If it is, the court defers to that interpretation. *Id.* at 843.

Congress' intent in enacting Section 318 is clear: It does not oust the FERC of its ratemaking authority unless an actual conflict exists between requirements imposed by the FERC and the SEC. Even if Congress' intent were less clear than it is, however, the FERC's interpretation of Section 318 is eminently reasonable. Accordingly, the holding below must be reversed because

there is no actual conflict between the FERC's application of its "comparable market" rule and any requirement imposed under PUHCA. Finally, the FERC's decision to set aside the coal charges as unjust and unreasonable did not violate Section 35.14(a)(7) of its own regulations.

I. CONGRESS CLEARLY DID NOT INTEND TO PREVENT THE FERC FROM REGULATING INTERSTATE WHOLESALE ELECTRIC RATES ABSENT AN ACTUAL CONFLICT WITH A REQUIREMENT OF *PUHCA* OR THE SEC.

In the Public Utility Act of 1935, Congress created a comprehensive scheme of federal regulation of public utility holding companies and the interstate operations of their utility operating subsidiaries. Congress implemented that scheme by granting to the SEC the primary responsibility for regulating holding companies pursuant to Title I of the Public Utility Act, PUHCA, and granting to the FERC the primary responsibility for regulating their operating subsidiaries under Title II, the FPA. Because of the abuses associated with both utilities and their holding companies, Congress granted the FERC and the SEC concurrent and complementary jurisdiction over a number of regulatory matters. Recognizing the possibility of conflicts between the two agencies, Congress included Section 318 of the FPA, the "conflict of jurisdiction" provision that is principally at issue in this case.

Contrary to the court of appeals' interpretation, Section 318 deprives the FERC of its ratemaking authority over a particular matter only in the event of an actual conflict between requirements imposed of or under the FPA and of or under PUHCA. This conclusion is demonstrated by the plain language of Section 318. It is confirmed by the legislative history of that provision as well as the structure of the Public Utility Act. In short, this is a case in which Congress has "directly spoken

to the precise question at issue." *Chevron*, *supra*, 467 U.S. at 842.

A. The Language Of Section 318 Plainly Indicates A Congressional Intent To Permit The FERC To Regulate Concurrently With The SEC Absent An Actual Conflict Between Requirements Of The SEC And The FERC.

"The starting point for . . . interpretation of a statute is always its language." *Community For Creative Non-Violence* v. *Reid*, 109 S.Ct. 2166, 2172 (1989); see *Dole* v. *United Steelworkers of America*, 110 S.Ct. 929, 934 (1990). The plain language of Section 318 deprives the FERC of authority *only* if (1) the *same* "person" is (2) "subject *both* to a *requirement*" imposed under PUHCA "*and* to a *requirement*" imposed under the FPA (3) with respect to the *same* "subject matter." 16 U.S.C. § 825q (emphasis added). The fact that the same person must be subject to two different "requirements" with respect to the same "subject matter" obviously assumes that the two requirements are in direct conflict. Otherwise, there would be no need to speak of "requirements," as opposed, for example, to "provisions" of the relevant statutes. Any possible doubt about whether the two "requirements" must conflict is removed by the heading of the section, enacted with the original legislation: "Conflict of Jurisdiction."[6]

The precise interpretation placed on Section 318 by the court of appeals is far from clear. There are indications that the court viewed Section 318 as creating exclusive jurisdiction in the SEC over all matters within its

[6] "Where headings are enacted as part of an act, . . . the headings may serve as an aid to the legislative intent." 2A *Sutherland Statutory Construction* § 47.14 (4th ed. 1984). This general rule is firmly grounded in decisions of this Court. *E.g.*, *Maguire* v. *Commissioner*, 313 U.S. 1, 9 (1941); *Knowlton* v. *Moore*, 178 U.S. 41, 65 (1900) (rejecting an interpretation of a federal statute as "rebutted by the heading"); see also *Hardin* v. *City Title & Escrow Co.*, 797 F.2d 1037, 1039 (D.C. Cir. 1986).

authority, regardless of whether the SEC exercised that authority by imposing any specific "requirements." See, *e.g.*, Pet. App. 11a. On the other hand, the court's opinion can be read, more narrowly, as granting exclusive jurisdiction to the SEC only when the SEC has actually exercised some authority over the "subject matter" at issue. See Pet. App. 14a. Both of these expansive interpretations of Section 318 violate at least two well-established principles of statutory construction.

First, they violate the principle that different words in the same statute should not be interpreted to have the same meaning. *E.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983); *United Savings Ass'n* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). Section 318 stands in marked contrast to Section 204(f) of the FPA, which serves a similar jurisdiction-allocating function but uses significantly different language. Section 204(f) exempts from the securities regulation scheme of Section 204 "a public utility organized and operating in a State under the laws of which its security issues are *regulated by* a State Commission." 16 U.S.C. § 824c(f) (emphasis added). In so doing, it makes state authority exclusive, not automatically, but only when a state chooses to exercise its jurisdiction by actually regulating the securities issues of a particular company.

The court of appeals interpreted Section 318 as though it ousts the FERC of jurisdiction whenever a particular "subject matter" is either "regulated" or subject to regulation by the SEC. Had Congress intended to grant the SEC such exclusive jurisdiction, it would have used one of those formulations—or some similar formulation such as "subject to the jurisdiction of the SEC."

Second, the court of appeals' reading of Section 318 violates the well-established principle that statutes should be interpreted to give meaning to every word and phrase, *i.e.*, to avoid rendering any provision redundant. See, *e.g.*, *Mountain States Tel. & Tel. Co.* v. *Pueblo of Santa Ana*,

472 U.S. 237, 249 (1985); *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955). Section 318 specifies that a person must be "subject . . . to a requirement of [PUHCA] or of a rule, regulation or order thereunder," and to "a requirement of the [FPA] or of a rule, regulation or order thereunder" with respect to the same subject matter. But the court of appeals simply read "a requirement of" out of the statute. The only way to give meaning to that phrase is to read Section 318 as the FERC did, *i.e.*, as requiring an actual conflict.

Moreover, both readings of the court of appeals' opinion are irreconcilable with *Northwestern Elec. Co.* v. *FPC*, 321 U.S. 119 (1944), in which this Court held that a conflict is required to invoke Section 318. *Id.* at 125. In that case, petitioner argued that because SEC accounting requirements and FPC accounting requirements covered "the same field," Section 318 ousted the FPC of jurisdiction. Pet. Reply Br. at 25, *Northwestern Elec. Co.* v. *FPC*, 321 U.S. 119 (1944). The court rejected that argument and held that "an examination of the statute and of the orders and proceedings of the Securities and Exchange Commission satisfies us that *no conflict exists*." *Id.* (emphasis added); see *Appalachian Power Co.* v. *FPC*, 328 F.2d 237, 250 (4th Cir.) ("Under section 318 of the Federal Power Act *actual conflicts* between the FPC and the SEC are resolved in favor of the SEC"), *cert. denied*, 379 U.S. 829 (1964) (emphasis added). Thus, this Court has already rejected the argument that the SEC and the FERC may not operate in the same regulatory field.

B. The Legislative History Of The Public Utility Act Confirms That Congress Intended Section 318 To Apply Only In Cases Of Actual Conflict Between Requirements Imposed By The SEC And The FERC.

The legislative history of Section 318 is significant in two respects. First, it directly confirms Congress' intent that Section 318 apply only in cases of genuine conflict. Second, it reveals that Congress well understood how to distinguish, in the language it selected, between a scheme of exclusive jurisdiction and a scheme of complementary, concurrent regulation.

1. Congress' intent that Section 318 would apply only in cases of actual conflict is demonstrated repeatedly by the legislative history. In 1934, President Roosevelt and congressional leaders requested the FPC to draft legislation to regulate electric utilities engaged in interstate commerce for the purpose of ensuring reasonable rates to consumers. DeVane, *Highlights of Legislative History of the Federal Power Act of 1935 and the Natural Gas Act of 1938*, 14 Geo. Wash. L. Rev. 30, 34 (1945) (account by former FPC solicitor and principal drafter of FPA). Meanwhile, the presidentially appointed National Power Policies Committee was drafting legislation to regulate holding companies. *Id.* at 37. Once the bills were drafted, congressional leaders decided that they should be introduced as a single package. The task of consolidating the two bills was delegated to yet another administration drafting committee:

> When it became obvious that the task assigned the committee could not be accomplished in the time allotted, those in charge of the drafting of the two bills got together and agreed upon the substance of an amendment to the Holding Company Bill, later incorporated in Section 3 of that Bill, (which was intended to provide for full cooperation between the Securities and Exchange Commission and the Federal Power Commission in administering the two acts) and to Section 318 of the Federal Power Bill . . .. resolving *conflicts* in favor of the Holding Company Act.

Id. at 37-38 (emphasis added). See Welch, *Functions of the Federal Power Commission in Relation to the Securities and Exchange Commission*, 14 Geo. Wash. L. Rev. 81, 82-83 (1945) (emphasis added).

Thus, the drafters of Section 318 recognized that PUHCA and the FPA granted concurrent authority to the SEC and the FPC over a number of subject areas. They did not, however, attempt to reconcile potential conflicts by granting exclusive jurisdiction to either agency. Instead, they expected that the two agencies would give each other "full cooperation" in administering their respective regulatory schemes, with actual "conflicts" between SEC and FPC requirements resolved in favor of the SEC.[7]

All of the legislative reports confirm the conclusion that Section 318 comes into play only in the event of conflicting requirements. For example, the Senate Committee on Interstate Commerce observed that "in case of *conflict* between the provisions of the Federal Power Act and [PUHCA], the requirements of the latter act shall apply, unless the person subject to such requirement has been exempted by the [SEC]." S. Rep. No. 621 at 54 (1935) (emphasis added); see also H.R. Rep. No. 1318, 74th Cong., 1st Sess. 35 (1935) (same); H.R. Conf. Rep. No. 1903 at 75 (Section 318 resolves "conflicts" between the SEC and FPC in favor of the former). That description of Section 318 is impossible to reconcile with the court of appeals' view that SEC authority is exclusive as to any "subject matter" that it regulates or is authorized to regulate in any way.[8]

[7] Similarly, the FPC explained to both the House and the Senate Committees that Section 318 "provides that in case of *conflict* between the provisions of the Federal Power Act and the Holding Company Act of 1935 the requirements under the latter act shall apply." *Public Utility Holding Companies: Hearings on H.R. 5423 Before the House Comm. on Interstate and Foreign Commerce*, 74th Cong., 1st Sess. 388 (1935) ("*House Hearings*") (emphasis added); *Public Utility Holding Company Act of 1935: Hearings on S. 1725 Before the Senate Comm. on Interstate Commerce*, 74th Cong., 1st Sess. 249 (1935) ("*Senate Hearings*") (same).

[8] As passed by both the House and Senate, Section 318 was limited to the list of subjects enumerated in that provision, *i.e.*, "the issue, sale, or guaranty of a security, the method of keeping accounts, the filing of reports or the acquisition or disposition of any security, capital assets, or facilities. . . ." It omitted the catch-all phase "or any other subject matter." S. 2796, 74th Cong., 1st Sess. § 316(a) (1935). Each of the enumerated subjects was an area over which both the SEC and the FERC had concurrent jurisdiction. See *infra* p. 30. The phrase "or any other subject matter" was added in conference. Its purpose was merely to ensure that *any* conflict between requirements imposed by the SEC and the FERC could be resolved. See H.R. Conf. Rep. No. 1903 at 75.

2. Congress' treatment of proposed amendments further confirms this conclusion. During the Senate debate, Senator Tydings proposed to add to PUHCA a section providing that if "any person is *subject to the law* of any State, *or regulation* by a State commission, such person shall not be subject to the requirements of [the Act] or of any rule, regulation, or order thereunder, with respect to the same subject matter." 79 Cong. Rec. 8399 (1935) (emphasis added). In contrast to the "requirement" language of Section 318, this provision would have expressly divested the federal agency of jurisdiction over a holding company under PUHCA if the holding company is "subject to the law of . . . or regulation by" any State. Senator Wheeler, Chairman of the Committee on Interstate and Foreign Commerce and sponsor of the Senate bill, opposed the amendment. He observed that it "is so broadly drawn that as a matter of fact it would completely exempt practically all the subsidiary or holding companies in some States." *Id.* The Senate rejected the amendment.

Nine days later, Senator Wheeler accepted an amendment (later deleted in conference) designed to preserve the concurrent jurisdiction of federal and state regulators. Among other things, the new amendment provided that if "any person subject to a *requirement* of [PUHCA] is also subject to a *requirement*" of a state statute or of a state commission, the federal requirement would not "impair the power or rights" of the state. 79 Cong. Rec. 8859 (1935). The Senate's adoption of this amendment,

which is similar to Section 318, after rejecting the previous version reveals its understanding that the two versions had materially different meanings.

The House of Representatives also adopted an amendment to Section 318 providing that if any person was "*subject to the law* of any State *or regulation* by a State commission, such person shall not be subject to the requirements of" the FPA or any orders thereunder. 79 Cong. Rec. 10,574 (1935). After the House passed the FPA with this amendment, the FPC objected:

> The effect of this amendment is to take from the Federal Power Commission much of the jurisdiction conferred upon it in other sections of the bill, and no doubt the contention will be made that it takes from the Commission all jurisdiction except over those utilities operating in States where there are no State commissions. This amendment makes all of title II . . . substantially unworkable.

79 Cong. Rec. 10,839 (1935).[9] Congress heeded the advice of the FPC and rejected this amendment in conference, preserving the FPC's broad ratemaking and regulatory powers.

As previously shown (*supra* p. 11), the court of appeals interpreted Section 318 as though it divested the FERC of its authority whenever a public utility is "subject to" any SEC regulation (or any authority to regulate, even if unexercised), rather than merely resolving conflicts between specific "requirements" imposed by both agencies. That interpretation is fundamentally at odds with Congress' own understanding of the lan-

[9] The floor manager of the FPA also strenuously objected to the adoption of this amendment, concluding that

> It would largely destroy the usefulness of the Federal regulation this bill gives to the Federal Power Commission. We cannot have effective regulation unless we give that Commission the power to get information and give it control over accounts and valuations.

79 Cong. Rec. 10,574 (statement of Rep. Lea).

guage used in Section 318. Like the amendments rejected by Congress, moreover, it makes the FPA "substantially unworkable."

C. The Court Of Appeals' Decision Is Inconsistent With The Structure Of The Public Utility Act Because It Creates Significant Gaps In The Comprehensive Regulatory Scheme Created By That Act.

Even if the language and legislative history of Section 318 were not dispositive, the structure of the Public Utility Act supports the FERC's interpretation that Section 318 applies only when there is an actual conflict between an SEC requirement and a FERC requirement. Compare, *e.g.*, *Crandon* v. *United States*, 110 S.Ct. 997, 1001 (1990); *K Mart Corp.* v. *Cartier, Inc.*, 108 S.Ct. 1811, 1817 (1988). The court of appeals' view—that the SEC has exclusive authority over any regulatory field in which it operates—is contradicted by Congress' evident intent to create dual, complementary regulatory regimes. The court of appeals' interpretation also creates enormous regulatory gaps that Congress plainly did not intend.

1. The two titles of the Public Utility Act—PUHCA and the FPA—were plainly designed to create complementary regulatory regimes. This is established by three features of the statutory scheme.

First, the FPA and PUHCA were enacted to fill two different gaps in the regulation of electric utilities by state regulatory agencies. See *Gulf States Utilities Co.* v. *FPC*, 411 U.S. 747, 758 (1973). One gap arose when local operating companies, previously subjected to state regulation in their intrastate operations, began to transmit and sell electricity at wholesale in interstate commerce. At about the same time, this Court held in *Public Utilities Comm'n* v. *Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927), that states were prohibited from regulating interstate wholesale rates of electric utilities.

Congress recognized that *Attleboro* resulted in a substantial void in the state-by-state regulatory scheme. S. Rep. No. 621 at 17; H.R. Rep. No. 1318 at 7-8. Accordingly, "the main purpose of [the FPA] was to 'fill the gap' created by *Attleboro* and its predecessors." *Arkansas Elec. Coop. Corp.* v. *Arkansas Public Serv. Comm'n*, 461 U.S. 375, 379 (1983).

The other gap resulted from the inability of state utility commissions "to reach and effectively control the local utility business when it was dominated and controlled by a holding company located in a far-off city." 79 Cong. Rec. 8773 (1935) (Sen. Wheeler). See PUHCA § 1(a), 15 U.S.C. § 79a(a) (holding company "activities extending over many States are not susceptible of effective control by any State and make difficult, if not impossible, effective State regulation of public-utility companies"). PUHCA itself states that its purpose was "to meet the problems and eliminate the evils . . . connected with public-utility holding companies." PUHCA § 1(c), 15 U.S.C. § 79a(c).[10]

Second, and consistent with the differing purposes of the two regulatory regimes, Congress gave the FPC and the SEC substantially different responsibilities and objectives. The FPC was empowered to regulate the "operating functions" of public utilities, including the operating subsidiaries of holding companies. S. Rep. No. 621 at 4; see also 79 Cong. Rec. 10,564 (1935) (Rep. Wadsworth). Its principal objective was to ensure that all "rate[s], charge[s] [and] classification[s]," as well as "any rule, regulation, practice, or contract affecting such rate, charge, or classification" were "just and reasonable." FPA § 206(a), 16 U.S.C. § 824e(a). Its mission was to foster the production of "an abundance of electricity at the lowest possible cost." S. Rep. No. 621 at 17.

[10] Section 1 of PUHCA listed five specific "evils" connected with public utility holding companies: (1) insufficient information about and regulation of a holding company's securities (PUHCA § 1(b)(1), 15 U.S.C. § 79a(b)(1)); (2) excessive charges made to operating public utilities for goods or services provided through inter-affiliate contracts (PUHCA § 1(b)(2), 15 U.S.C. 79a(b)(2)); (3) control of an operating utility's accounting practices so as to thwart state regulation (PUHCA § 1(b)(3), 15 U.S.C. § 79a(b)(3)); (4) undue growth of holding companies (PUHCA § 1(b)(4), 15 U.S.C. § 79a(b)(4)); and (5) inadequate service or inadequate public regulation (PUHCA § 1(b)(5), 15 U.S.C. § 79a(b)(5)). Noticeably absent from this list is any mention of excessive interstate wholesale rates, which Congress obviously believed would be fully regulated under the FPA.

The SEC, by contrast, was given no responsibility over rates or any other "operating functions" of public utilities. The Senate Committee explained the difference:

> [T]itle [I] is concerned only with holding companies in the public-utility field, defined for the purposes of the title as companies which "control" operating public-utility companies. Title I does not eliminate any operating utility company or *regulate it in any of its operating functions.*

S. Rep. No. 621 at 4 (emphasis added). See also 79 Cong. Rec. 10,564 (1935) (Rep. Wadsworth) ("The Securities Exchange Commission has charge of the regulation of registered holding companies and not of the operating companies engaged in interstate transportation of electrical energy"). Thus, although the SEC was given "jurisdiction" over all of the subsidiaries, including the operating subsidiaries, of any holding company (see generally PUHCA § 2(a), 15 U.S.C. § 79b(a)), its statutory mandate was to implement a regulatory scheme designed to "eliminate the evils . . . connected with public-utility holding companies" (PUHCA § 1(c), 15 U.S.C. § 79a(c)), not to regulate their utility operations.[11] Un-

[11] While Congress ultimately agreed, after seriously considering abolishing public utility holding companies, to permit the continuation of certain holding companies as long as they restructured their operations, one of the primary purposes of PUHCA was "to provide as soon as practicable for the elimination of public-utility

like the FPC, moreover, the SEC was given express statutory responsibility to regulate for the protection of investors as well as consumers. *E.g.*, PUHCA §§ 6(b), 7(a), 13(b).

Third, the SEC and the FERC were given substantially different tools with which to accomplish their missions. The FERC's most important tool is its authority to determine whether a rate, including the impact of any contract or other practice that affects that rate, is "just and reasonable." As this Court has frequently recognized, the "just and reasonable" standard gives the FERC wide discretion in the setting of rates and charges. *E.g.*, *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944); *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 291 (1974). This is the same broad authority long associated with economic rate regulation. By specifying that rates must be "just and reasonable," Congress was fully aware that it was giving the FERC a powerful regulatory weapon.

Congress also gave the FERC a number of other important powers incident to its ratemaking responsibilities. Section 208 authorized the FERC to "ascertain the actual *legitimate* cost of [utility] properly." 16 U.S.C. § 824g(a) (emphasis added). This, of course, authorizes the FERC to look behind cost data provided by regulated utilities to determine whether any costs incurred are prudent. The FPA also provided the procedural mechanisms necessary to regulate electric rates: complaint procedures (FPA § 306, 16 U.S.C. § 825e); investigative procedures (FPA § 307, 16 U.S.C. § 825f); hearing procedures (FPA § 308, 16 U.S.C. § 825g); and, perhaps most important, the ability to order refunds if a utility is found

holding companies except as otherwise expressly provided in [PUHCA]." PUHCA § 1(c), 15 U.S.C. § 79a(c). Compare S. 2796, 74th Cong., 1st Sess. § 11 (1935) with FPA § 201(a), 16 U.S.C. § 824(a).

to have violated the "just and reasonable" standard (FPA § 205(e), 16 U.S.C. § 824d(e)).

The SEC, by contrast, was given extensive authority to regulate financial transactions by or within public utility holding companies. See, *e.g.*, PUHCA §§ 7, 10, 13(b), 15. But it was not expressly granted any of the ratemaking and related powers given to the FERC. To be sure, Section 13(b) permits the SEC to reject an inter-affiliate contract if the goods or services to be provided thereunder are not provided "at cost, fairly and equitably allocated among [affiliated] companies," as defined by SEC rule or order. 15 U.S.C. § 79m(b). But the SEC does not have express authority to reject any contract or other practice of a public utility solely because, in the SEC's view, it is not "just and reasonable." Similarly, PUHCA provides no procedures by which a customer can initiate a complaint, no procedures for investigating or holding hearings with respect to rates, and no mechanism for ordering refunds to customers.

Indeed, Congress, at the SEC's urging, expressly rejected a proposal that would have granted limited ratemaking powers to the SEC under what is now Section 13(b) of the PUHCA. The House bill required the SEC to act as a quasi-ratemaking body with respect to affiliate contracts, setting, *inter alia*, a contract price that it deemed "necessary or appropriate in the public interest or for the protection of investors or consumers." H.R. 5423, 74th Cong., 1st Sess. § 13 (1935). The Senate bill, on the other hand, required only that such contracts be performed "at cost fairly and equitably allocated among [the affiliated] companies." S. 2796, 74th Cong., 1st Sess. § 13 (1935). After passage of both bills, but before they were referred to a conference committee, the chairman of the SEC balked at granting his agency this broad authority:

> It is also my opinion that from an administrative point of view section 13 of the House bill is open to

> serious objection. The comparable section in the Senate bill was very definite and explicit to the effect that intrasystem service transactions should be on a cost or mutual basis. The administration of such a law involves no great burden.
>
> The language of section 13 (of the House bill) seems to indicate that our Commission is required to pass on . . . intercompany service contracts to determine whether their terms are fair and involve no unreasonable profit. It appears to me that this task which will devolve upon the Commission will be an impossible one.

Letter from Joseph P. Kennedy, Chairman, SEC to Senator Wheeler (July 9, 1935), *reprinted in* 79 Cong. Rec. 10,838. Congress agreed with the SEC. It granted the SEC the limited authority contained in current Section 13 (see H.R. Conf. Rep. 1903 at 72), reserving to the FERC the more difficult task of determining "just and reasonable" rates and charges, including, in Chairman Kennedy's words, whether the terms of inter-company service contracts "involve no unreasonable profit."

To be sure, both agencies were also given some authority over the four "subject matters" specifically identified in Section 318: (1) "the issue, sale, or guaranty of a security" (see FPA § 204, 16 U.S.C. § 824c; PUHCA §§ 6, 12, 15 U.S.C. §§ 79f, 79l); (2) "the method of keeping accounts" (see FPA § 301, 16 U.S.C. § 825(c); PUHCA § 14, 15 U.S.C. § 79n); (3) "the filing of reports" (FPA § 304, 16 U.S.C. §825c; PUHCA § 14, 15 U.S.C. § 79n); and (4) "the acquisition or disposition of any security, capital assets, or facilities" (FPA § 203, 16 U.S.C. § 824b; PUHCA §§ 9, 10, 15 U.S.C. §§ 79i, 79j). Both agencies were also given authority over interlocking directorates (see FPA § 305, 16 U.S.C. § 825d; PUHCA § 17, 15 U.S.C. § 79q) and, most relevant to this case, over inter-affiliate contracts for goods and services (FPA § 206(a), 16 U.S.C. § 824e(a); PUHCA § 13(b), 15 U.S.C. § 79m(b)). But the striking

differences in the other responsibilities and powers given to the two agencies strongly indicate that, even in these areas of shared authority, Congress did not view regulation by the SEC as a substitute for regulation by the FERC.[12] Rather, SEC and FERC regulation were designed to complement one another for the ultimate benefit of both consumers and investors.

This commingling of functions for a common purpose, in turn, suggests that the two agencies would exercise concurrent authority in areas of joint responsibility as long as that did not impose inconsistent obligations on the regulated utility. To view Section 318 as vesting the

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[12] Indeed, the legislative history of PUHCA shows that Congress did not consider the SEC's jurisdiction over inter-affiliate contracts as a substitute for—or to conflict with—ratemaking review. In testimony on the House bill, Commissioner Seavey of the FPC provided the following example of the effect of affiliate contracts on rates:

> The San Diego Gas & Electric Co. is a subsidiary of the Byllesby people. They have been charging something like $170,000 yearly for their services. The California commission found that $70,000 was a reasonable cost of those services, and only allowed that much in fixing rates; but the Byllesby Co. can still draw upon that company and deplete its reserves, without [the utility] being able to take it in a rate case.

House Hearings at 407 (statement of Commissioner Seavey); see also *Senate Hearings* at 757-58 (statement of John Benton, Nat'l Assoc. of Railroad and Utility Commissioners). In response to questions from members of the Committee, Commissioner Seavey pointed out that even though the regulators limited recovery from ratepayers to the market value, the underlying contract remained valid and, because state commissions lacked authority to halt such an abuse, the holding company could continue to drain the earnings of the operating company based on the $170,000 face amount of that contract. *House Hearings* at 409. Commissioner Seavey stressed that the only authority of state commissions was to regulate the income that the operating companies received in rates, and not the expenses that those companies paid on contracts. The manifest purpose of Section 13(b) was to prevent such "bleeding" of public utility companies by the holding companies that owned them, not to limit rate-making review.

SEC with exclusive jurisdiction over these matters both distorts and undermines the dual scheme of federal regulation created by Congress.

2. As this Court has observed, "Congress' purpose in 1935 was to fill a regulatory gap, not to perpetuate one." *Arkansas Elec. Coop.*, 461 U.S. at 384. Yet, the court of appeals' interpretation of Section 318 creates several gaping holes in the regulatory structure of the Public Utility Act. If the SEC's jurisdiction were exclusive as to any "subject matter" over which it has regulatory authority (or over which it chooses to exercise such authority), then the FERC would have no authority over a number of significant regulatory problems. In short, the court of appeals "imput[ed] to Congress a purpose to paralyze with one hand what it sought to promote with the other." *American Paper Inst., Inc.* v. *American Elec. Power Serv. Co.*, 461 U.S. 402, 421 (1983).

First, under the court of appeals' decision, the FERC would have no authority to impose accounting or record-keeping requirements upon public utilities that are owned by registered holding companies, as it is plainly authorized to do by Sections 301 and 304 of the EPA (see *Northwestern Elec. Co.* v. *FPC*, 321 U.S. at 122) because the SEC has exercised its authority to impose such requirements on those same companies. See PUHCA § 15, 17 C.F.R. pt. 256 (1989). These companies represent a substantial part of the FERC's regulatory docket: They serve, directly or indirectly, approximately 49 million households and businesses in 30 states and the District of Columbia, and account for approximately 16 percent of revenues from the sale of power generated by all electric utilities.[13] Given the importance of proper accounting and reporting procedures in determining just and

[13] See Federal Energy Regulatory Commission, FERC Form 1, Annual Reports of Major Electric Utilities, Licensees and Others (1988); Electrical World, Directory of Electric Utilities (98th ed. 1990).

reasonable rates, a limitation on the FERC's authority over accounting and reporting requirements would make it virtually impossible for the FERC to carry out its vital regulatory mission. Congress could not have intended such a result. See *supra* note 9.

Second, the court of appeals' interpretation of Section 318 would likewise oust the FERC of any regulatory jurisdiction (under Sections 203 and 204 of the FPA) over major transactions—including the sale of utility assets and securities issues—involving public utilities owned by holding companies. Precluding review of these matters by the FERC would deprive consumers of any assurance that such transactions will preserve their ability to purchase electricity at "just and reasonable" rates.

Third, the court of appeals' interpretation of Section 318 also effectively eliminates *all* review of the "justness and reasonableness" of costs incurred in connection with inter-affiliate contracts. That includes not only fuel costs, but also such other operating expenses as engineering costs, legal costs, accounting costs, and communications costs. It also includes capital costs for items such as the construction of a nuclear reactor or a hydroelectric plant.[14] Under the court of appeals' decision, the FERC could not, for example, determine whether costs incurred under an inter-affiliate contract in building a nuclear reactor are prudent: it must simply accept the entire "cost" so incurred. The decision below thus makes it impossible for FERC to protect nearly 50 million ratepayers against potential self-dealing, unnecessary "gold plating" of plant and equipment, and rate manipulation arising

[14] In addition to numerous coal subsidiaries, utility holding companies also have nuclear fuel subsidiaries, fuel oil subsidiaries, real estate subsidiaries, communications subsidiaries, leasing subsidiaries, credit subsidiaries, legal, accounting and engineering service subsidiaries, construction subsidiaries, electric generation subsidiaries and assorted other subsidiary service companies. See SEC Financial and Corporate Report on Holding Companies Registered Under the Public Utility Holding Company Act of 1935 at 12-65 (Dec. 31, 1988).

from transactions between electric utilities and their affiliates. See *supra* p. 32. For that reason, it creates a perverse incentive for any holding company to force its operating utility subsidiary to purchase an ever greater share of its inputs from affiliates. It also encourages other public utilities to adopt the holding company form in order to evade regulation, contrary to Congress' clear intent in enacting PUHCA. See PUHCA § 1(b)(2), 15 U.S.C. § 79a(b)(2); note 11 *supra*.

This case well illustrates the effects of this regulatory gap on consumers. The FERC found that the prices Ohio Power paid SOCCO for coal exceeded market prices by 24 to 94 percent from 1981 to 1986. Therefore, because coal costs represent approximately half the costs of generating electricity from coal-fired generators, the rates paid by petitioners (and their residents) between 1981 and 1986 were 12 to 47 percent higher than they would have been if the coal cost component of those rates had been limited to market prices or if Ohio Power had purchased coal from another source in an arms-length transaction. Thus, the decision below will likely lead to substantial increases in the rates petitioners (and their residents) must now pay for electricity, as well as requiring petitioners to repay the substantial overcharges refunded to petitioners under the FERC's decision. Ironically, the decision below enables Ohio Power to charge rates that would unquestionably be illegal for any other electric utility, merely because it is owned by a registered holding company.

Congress did not intend to create this enormous regulatory gap. Indeed, inter-affiliate contracts for the purchase of fuel at above-market prices were specifically identified as one of seventeen "Reprehensible Practices of Holding Companies" by Congressman Rayburn, who pointed out "instances of where fuel for the operating company cost the operating company more than twice as much as it could have been had in the open market." 79 Cong. Rec. 10,317. See also S. Rep. No. 621 at 36 (inter-

affiliate contracts "one of the most abused devices of the public-utility holding company system"); see H.R. Rep. No. 1318 at 19; see also PUHCA § 1(b)(2), 15 U.S.C. § 79a(b)(2). As this case demonstrates, only the FERC has both the responsibility and the ability to ensure that costs paid by a public utility do not result in unjust and unreasonable rates. Given its obvious concern about above-market fuel contracts, Congress could not rationally have intended to preclude ratemaking review of such contracts by the FERC.

II. EVEN IF CONGRESS' INTENT WERE NOT CLEAR, THE FERC'S INTERPRETATION IS A PERMISSIBLE READING OF ITS OWN ORGANIC STATUTE.

Even if Congress' intent in enacting Section 318 were less clear than it is, the FERC's interpretation of that provision is at least reasonable, given the language, legislative history and structure of the statute. Thus, this Court should defer to the FERC's interpretation under the second step of *Chevron*. The only possible reasons not to follow that approach here are 1) that the provision is "jurisdictional" and 2) that it also implicates the SEC's authority. But the rationale for *Chevron* deference applies with equal force to both jurisdictional and nonjurisdictional provisions in an agency's organic statute. And in this case, both agencies affected by the particular provision agree on its interpretation.

1. A number of reasons have been advanced for judicial deference to an agency's reasonable interpretation of its own organic statute. First, an ambiguity in a statutory provision often reflects a congressional intent to delegate to the agency quasi-legislative authority or discretion.[15] Second, an agency's expertise—in the his-

[15] *See Investment Co. Inst.* v. *Conover*, 790 F.2d 925, 935 (D.C. Cir.) ("*Chevron* teaches that Congress may delegate interpretative authority implicitly—by failing to legislate in sufficient detail as to resolve a particular question of interpretation"), *cert. denied*, 479 U.S. 939 (1986); Scalia, *Judicial Deference To Administrative In-*

tory and purposes of its enabling legislation as well as in its administration—frequently places the agency in a better position than a reviewing court not only to determine Congress' intent, but also to determine which interpretation of an ambiguous statutory phrase will best comport with the agency's overall mission and regulatory priorities.[16] Third, deference to agency interpretations preserves an agency's flexibility to adapt its statutory mandate to changing needs.[17]

Each of these considerations applies with equal force to an agency's interpretation of both "jurisdictional" and "substantive" provisions. There is no reason to assume that when Congress defines the limits of an agency's jurisdiction in ambiguous terms, the ambiguity should not be resolved by the agency. That process of implementing Congress' intent is no different for a jurisdictional provision than for a substantive one.[18] Nor is there any reason to assume that Congress would not have entrusted the agency with a measure of discretion to define its own jurisdiction. Federal courts have been authorized to decide for themselves the sweep of their jurisdiction since the Judiciary Act was passed by the First Congress.

Similarly, an agency's expertise is not inherently less valuable when it interprets jurisdictional provisions: An agency certainly may have unique insights into the intended scope of its powers by virtue of its involvement in drafting the legislation and in commenting on potential amendments. Moreover, an agency's familiarity with its own regulatory program will inevitably give it an advantage in assessing the practical effects of a broader or narrower reading of its statutory authority.[19] And an agency's ability to decide the scope of its authority is just as important—with respect to its ability to adapt its administrative scheme to the regulatory needs of the day—

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terpretations Of Law, 1989 Duke L.J. 511, 516 ("*Chevron* . . . replaced this statute-by-statute evaluation [of prior decisions] . . . with an across-the-board presumption that, in the case of ambiguity, agency discretion is meant").

[16] See *Aluminum Co. of America* v. *Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 389-90 (1984) (deference particularly appropriate because agency was "intimately involved in the drafting and consideration of the statute by Congress"); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965) (deference accorded to agency "charged with the responsibility of setting [the act's] machinery in motion, of making the parts work efficiently and smoothly"); *NLRB* v. *Hearst Publications*, 322 U.S. 111, 130 (1944) (agency's "everyday experience in the administration of the statute gives it familiarity with the circumstances and backgrounds of employment relationships in various industries").

[17] See Starr, *Judicial Review in the Post-Chevron Era*, 3 Yale J. on Reg. 283, 297 (1986) ("[T]o engage in informed rulemaking, the agency must consider varying interpretations and the wisdom of its policy on a continuing basis") (quoting *Chevron*, 467 U.S. at 863). See also Scalia, *Judicial Deference To Administrative Interpretations of Law*, 1989 Duke L.J. 511, 517-18 ("One of the major disadvantages of having the courts resolve ambiguities is that they resolve them for ever and ever; only statutory amendment can produce a change").

[18] Indeed, there is often no meaningful distinction between jurisdictional issues and issues involving the "mere" application of an agency's authority. See *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 380 (1988) (Scalia, J., concurring). An agency's interpretation of key substantive provisions may have far-reaching consequences for the scope of that agency's jurisdiction. See, *e.g.*, *Bayside Enterprises, Inc.* v. *NLRB*, 429 U.S. 298, 302-03 (1977) (deferring to agency's determination that employees not "agricultural laborers" and therefore not exempt from labor legislation); *NLRB* v. *Hearst Publications*, 322 U.S. at 130 (deferring to agency's determination that newsboys were "employees" within meaning of labor act).

[19] See, *e.g.*, *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 845 (1986) ("An agency's experience is superior to that of a court when a dispute centers on whether a particular regulation is reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of the act the agency is charged with enforcing"); *Massachusetts* v. *Morash*, 109 S.Ct. 1668, 1674 (1989); *INS* v. *Jong Ha Wang*, 450 U.S. 139, 144 (1981) (per curiam).

as its ability to interpret its organic statute's substantive requirements.[20]

Accordingly, this Court has often accorded *Chevron* deference to agency interpretations of jurisdictional provisions arising under an agency's organic statute. In *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833 (1986), for example, the issue was whether the CFTC had jurisdiction over common law counterclaims arising out of the same transaction that gave rise to a reparations complaint. The Court deferred to the CFTC's position that it had jurisdiction, expressly rejecting the argument that the agency's expertise was irrelevant because of the "statutory jurisdictional-interpretation" nature of the issue. *Id.* at 845. The Court has also recently noted its long-standing deference to the NLRB's construction of the NLRA, regardless whether the disputed provisions construed are "substantive," "legal" or "jurisdictional." *NLRB* v. *City Disposal Sys.*, 465 U.S. 822, 830 n.7 (1984). See also *Dole* v. *United Steelworkers of America*, 110 S.Ct. 929, 944 (1990) (White, J., dissenting, joined by Rehnquist, C.J.) (application of *Chevron* deference cannot be avoided on the basis that the challenged interpretations concern the agency's jurisdiction); *Mississippi Power & Light Co.*, 487 U.S. at 378 (Scalia, J., concurring) (same).

2. The traditional reasons for deferring to a reasonable agency interpretation of its own organic statutes also apply to Section 318. First, Congress placed Section 318 in the FPA, thereby implicitly delegating to the FPC authority to resolve any ambiguity in that provision. Second, the FERC's predecessor—the FPC—drafted the original version of the Federal Power Act and testified

[20] See, *e.g.*, *NLRB* v. *City Disposal Sys.*, 465 U.S. 822, 839-40 n.7 (1984) (NLRB's construction of "concerted activity" was reasonable, especially in light of "Board's special function of applying the general provisions of the Act to the complexities of industrial life").

several times during Congress' consideration of that Act.[21] Third, the FERC is best situated to determine what impact various interpretations of Section 318 might have on its statutory mandate to ensure just and reasonable rates. Here, it recognized that depriving it of jurisdiction to regulate wholesale rates would create a regulatory gap that would prevent it from protecting millions of consumers.

The only feature of Section 318 that differs from other jurisdictional provisions is that, as the court of appeals observed (Pet. App. 9a), Section 318 implicates the authority of the SEC as well as the FERC. But, given Congress' decision to include Section 318 in the FERC's organic statute, it is reasonable to assume that Congress intended the FERC, rather than the SEC, to resolve any ambiguities that might arise in the application of that provision. The Court need not decide that question in this case, however, because the SEC agrees with the FERC's interpretation that Section 318 applies only in cases of actual conflict. See Brief for Federal Respondent.[22] Regardless of whether Congress would have preferred that any ambiguities in Section 318 be resolved by the SEC or the FERC, it cannot be presumed, consistent with *Chevron* and its rationale, to have intended that such ambiguities be resolved by the judicial branch in defiance of the views of both Commissions.

[21] See *Connecticut Light & Power Co.* v. *FPC*, 324 U.S. 515, 525 (1945); *Senate Hearings* at 223-76; *House Hearings* at 384-488. DeVane, *supra*, 14 Geo. Wash. L. Rev. at 34.

[22] The last time Section 318 was before this Court, the SEC stated:

> Section 318 of the Public Utility Act of 1935 resolves the question of possible *conflicting requirements* of [PUHCA] and rules, regulations, and orders thereunder with the [FPA] and rules, regulations and orders thereunder by providing that in case of conflicts the requirements of the former Act shall prevail.

Respondents' Br. App. D. at 98-99. *Northwestern Elec. Co.* v. *FPC*, 321 U.S. 119 (1944) (emphasis added).

III. SECTION 318 DOES NOT OUST THE FERC OF ITS AUTHORITY TO PREVENT OHIO POWER FROM CHARGING UNJUST AND UNREASONABLE RATES FOR WHOLESALE ELECTRICITY BASED ON ABOVE-MARKET COAL PRICES.

Whether the meaning of Section 318 is resolved by resorting to Congress' intent or by deferring to the FERC, the proper interpretation is clear: Section 318 does not oust the FERC of its ratemaking authority unless there is an actual conflict between a requirement of the FERC under the FPA and a requirement of the SEC under PUHCA with respect to the same "subject matter." There are no conflicting requirements in this case.

1,. Nothing in Section 13(b), the SEC regulations or the SEC orders regarding SOCCO imposes any "requirement" on Ohio Power within the meaning of Section 318. Pet. App. 20a-23a (Mivka, J., concurring). "Require," the root of "requirement," means "to demand as necessary or essential." *Webster's Third New International Dictionary* 1929 (1971); see *Black's Law Dictionary* 1172 (5th ed. 1979) ("[to] direct, order, demand, instruct, command, claim, compel, request, need [or] exact"). It is not enough to conclude, as the court of appeals did, that a conflict exists simply because a certain activity of a company might fall within the potential scope of Section 13. Rather, it is necessary to determine the specific demands placed on Ohio Power under the PUHCA and under the FPA.[23]

[23] The SEC has plainly stated:

> Until the S.E.C. does by rule or order impose "requirements" . . ., there can be no conflict of requirements and Sec. 318 does not apply. It was not intended that utility companies should be able to thwart regulation by the F.P.C. by conjuring up under Sec. 318 imaginary conflicts with potential action of the S.E.C.

Respondents' Br. App. D at 98-99, *Northwestern Elec. Co.* v. *FPC*, 321 U.S. 119 (1944). In addition, in commenting on a FERC report regarding the coal procurement policies of AEP, the SEC staff

Section 13(b) of PUHCA does not impose any requirements on Ohio Power. By its terms, that provision does not *require* that inter-affiliate contracts be performed "at cost." It merely directs the SEC to enact regulations to "insure that such contracts are performed economically and efficiently for the benefit of such associate companies at cost, fairly and equitably allocated among such companies." See 15 U.S.C. § 79m(b). The only "requirement" imposed directly by Section 13(b) is that affiliate contracts between the subsidiary and an associate operating company comply with regulations and orders of the SEC. *Id.*[24] Thus, there are no "requirements" unless the SEC imposes them.

The SEC's regulations, in turn, correctly view the "at cost" language in Section 13(b) as prohibiting only the payment of a price in *excess* of cost, consistent with Congress' intent to avoid "excessive charges" resulting from the lack of arm's-length bargaining between affiliates. See PUHCA § 1(b)(2); see also Pet. App. 21a (Mikva, J., concurring). Thus, the SEC regulations specifically

observed: "[t]here is no conflict with FERC jurisdiction, in setting rates FERC is legally bound to give due consideration to cost of service, which certainly includes cost of fuel burned, but there are a number of intermediary steps between our order authorizing an affiliate to acquire and mine coal reserves and the rate determination. . . ." Comment of the Division of Corporate Regulation of the Securities and Exchange Commission on the Federal Energy Regulatory Commission Staff Preliminary Report of Investigation in FERC Docket No. E-9206, dated July 31, 1978, quoted at Pet App. 38a.

[24] Indeed, Section 1(c) of PUHCA requires that PUHCA's terms "shall be interpreted to meet the problems and eliminate the evils as enumerated in this section." 15 U.S.C. § 79(c). One of those "evils" was the abuses arising from inter-affiliate contracts. See *supra* note 10. Because both the FERC and the SEC share responsibility over inter-affiliate contracts (see *supra* pp. 30-31), Section 13(b) should be construed in a way that preserves the FERC's authority as well as the SEC's authority.

prohibit the performance of sales contracts "at more than cost." 17 C.F.R. § 250.90(a)(2) (1989).[25]

The "orders" issued by the SEC and relied upon by Ohio Power in this case also do not place any demands or requirements on Ohio Power. As an initial matter, none of the orders *requires* Ohio Power to buy any coal from SOCCO at any price. Moreover, if Ohio Power chooses to take coal under its contract, the orders do not impose a minimum price for the captive coal, but merely establish a ceiling. The cost provisions of those orders are permissive, not mandatory. The most recent order, for example, provides that "[t]he price at which SOCCO's coal will be sold to AEP system companies will not exceed the cost thereof to the seller." *Southern Ohio Coal Co.*, HCAR No. 21537 (Apr. 25, 1980) (J.A. 93).[26]

Because nothing in PUHCA or the relevant SEC regulations and orders imposes any "requirement" on Ohio Power, Section 318 plainly does not apply. There can be no "actual conflict" between two regulatory regimes when one of those regimes imposes no requirement on the complaining party. *E.g.*, *Northwest Central Pipeline Corp.* v. *State Corp. Comm'n*, 109 S.Ct. 1262, 1277

[25] Indeed, SEC Rule 92 also imposes a ceiling at "the price at which the purchaser might reasonably be expected to obtain comparable goods elsewhere." 17 C.F.R. § 250.92(b). This rule therefore confirms that the "cost" standard embodied on Section 13(b) does not inevitably require that a utility company pay the actual out-of-pocket costs incurred by an affiliate.

[26] See also *Ohio Power Co.*, HCAR No. 20515 (Apr. 24, 1978) (J.A. 79) (price "will not exceed cost thereof to the seller"); cf. *Ohio Power Co.*, HCAR No. 17383 (Dec. 2, 1971) (J.A. 76) (charges will be "based on" actual cost). Under one of the orders, moreover, Ohio Power agreed to pay *less than* the cost of coal if its after-tax capital costs exceed a certain interest rate. *Southern Ohio Coal Co.*, HCAR No. 21008 (Apr. 17, 1979) (J.A. 85). Moreover, this ceiling price is not a finding or requirement imposed by the SEC; instead, the orders merely incorporate the statements made by Ohio Power and SOCCO in their applications. See *supra* p. 7.

n.13 (1989) (rejecting claim that state law conflicted with federal prudent-purchasing requirements because provision of state law "imposes no obligations on pipelines [and] obviously cannot make it 'impossible' for them to comply with federal law").

2. Even if PUHCA or the SEC's regulations or orders somehow imposed a requirement on Ohio Power to purchase coal from SOCCO and to pay SOCCO's "cost" of producing coal, such a requirement does not produce an acutal conflict with the FERC's determination that the full amount of those costs may not be passed on to Ohio Power's customers.[27] There is no conflict unless "'compliance with . . . regulations is a physical impossibility.'" *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 204 (1983), quoting *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-43 (1963).[28] It is not physically impossible for Ohio Power to comply with the orders of both the SEC and the FERC.

First, as noted above, the SEC orders relied upon by Ohio Power establish only a *ceiling* price on the coal.

[27] The FERC's determination that "setting the intracorporate price and setting rates are not the same subject matter which would bring Section 318 into play" (Pet. App. 37a) essentially embodies this conflict analysis.

[28] The preemption cases on which the court of appeals relied are wholly inapposite. Pet. App. 9a, 10a-11a. In *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986), this Court held that states may not reconsider FERC rate allocations under the filed rate doctrine. 476 U.S. at 963. The filed rate doctrine is firmly rooted in the FPA's grant of *exclusive* jurisdiction to the FERC vis-a-vis state regulators to set wholesale interstate electric rates, thereby preempting that field from any state regulation. See *id.* at 966. Here, where federal jurisdiction is explicitly granted to the FERC to regulate wholesale electric rates and the Public Utility Act contemplates a scheme of *concurrent* jurisdiction, any contention that the SEC has occupied the field is plainly without merit.

Because the market price set by the FERC is lower than this ceiling, the provisions are not incompatible.

Second, even though Ohio Power pays SOCCO the "costs" of coal, it is not required by anything in the SEC's regulations or orders to pass this cost along to its customers. Like any other utility whose costs are reviewed by the FERC, Ohio Power can simply absorb the difference between the "cost" and the recovery permitted by the FERC under a market-based price. It is certainly a known risk that not all of the actual costs incurred by the utility may be recoverable in a rate proceeding. In short, because Ohio Power can comply with both the SEC's and the FERC's orders, Section 318 creates no bar to implementation of FERC's rate determination.[29]

IV. THE DECISION BELOW CANNOT BE AFFIRMED ON THE ALTERNATIVE GROUND THAT THE FERC'S DECISION IS INCONSISTENT WITH ITS OWN REGULATION.

Ohio Power argued below that a FERC regulation, 18 C.F.R. § 35.14(a)(7), must be construed as creating a conclusive presumption that fuel costs incurred pursuant

[29] In addition, the SEC did not purport in any of its orders to determine the reasonableness or propriety of the price Ohio Power would pay for its coal. Indeed, *none* of these orders was issued pursuant to or in reliance upon the SEC's authority under Section 13(b). Those orders authorizd: (1) Ohio Power to inject capital in SOCCO pursuant to Sections 6(b), 9 and 10 of PUHCA, *Ohio Power Co.*, HCAR No. 17,383 (Dec. 2, 1971) (J.A. 76); (2) Ohio Power to inject additional capital in SOCCO and to sell mines and leases to SOCCO pursuant to Sections 6, 7, 9 and 10 of PUHCA, *Ohio Power Co.*, HCAR Holding Co. Act No. 20,515 (Apr. 24, 1978) (J.A. 79); (3) SOCCO to borrow funds pursuant to Sections 6, 7, 12(b), 12(c) and 12(f) of PUHCA, *Southern Ohio Coal Co.*, HCAR No. 21,008 (Apr. 17, 1979) (J.A. 85); and (4) SOCCO to receive additional capital from Ohio Power pursuant to Sections 6, 7, 9, 10 and 12 of PUHCA, *Southern Ohio Coal Co.*, HCAR No. 21,537 (Apr. 25, 1980) (J.A. 93). Any suggestion that permitting the FERC to exercise its ratemaking authority in this case would interfere with the SEC's regulatory objectives is fanciful.

to an inter-affiliate contract subject to the SEC's authority are just and reasonable.[30] The FERC rejected that argument. It held that the regulation merely creates a rebuttable presumption, which it found to be rebutted here. Pet. App. 40a-41a. The FERC's interpretation of its own regulation is entitled to the highest deference and cannot be rejected by a reviewing court unless it is unreasonable. See, *e.g.*, *Jewett* v. *Commissioner*, 455 U.S. 305, 318 (1982); *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965); *Union of Concerned Scientists* v. *NRC*, 711 F.2d 370, 381 (D.C. Cir. 1983) (administrative interpretation must be accepted unless it "flies in the face of the language of the rule itself"). The FERC's interpretation of Section 35.14(a)(7) is eminently reasonable for at least two reasons.

First, several courts have construed similar language—*i.e.*, "shall be deemed"—as creating a rebuttable rather than a conclusive presumption. In *Lavine* v. *Milne*, 424 U.S. 577 (1976), for example, this Court considered a provision of New York law providing that "a person who applies for [welfare] assistance within 75 days after voluntarily terminating his employment shall be 'deemed' to have done so [*i.e.*, terminated his employment] for the purpose of qualifying for such assistance . . ." *Id.* at 579 (quoting 18 NY Soc. Serv. Law § 131 (11) (Supp. 1975)). The Court held that the provision "merely makes absolutely clear the fact that the applicant bears the burden of proof on this issue . . ." (*id.* at 584), and expressly rejected the argument that the language of the provision "conclusively presumed" anything against the applicant. *Id.* at 584-85 n.9.[31]

[30] The rule provides, in part: "where a utility purchases fuel from a company-owned or controlled source, the price of which is subject to the jurisdiction of a regulatory body, such cost shall be deemed to be reasonable and includable in the adjustment clause." 18 C.F.R. § 35.14(a)(7).

[31] See also *Gaither* v. *Myers*, 404 F.2d 216, 219 n.5 (D.C. Cir. 1968) (noting that statute providing that driver of another's auto-

Second, the FERC's interpretation avoids the same regulatory gap that is left by the court of appeals' reading of Section 318. See *supra* pp. 32-34. A conclusive presumption of reasonableness would render the FERC powerless to prevent utilities from passing improperly inflated costs on to purchasers, and ultimately, consumers. The FERC has consistently interpreted the regulation to avoid that result. See *McDowell County Consumers Council* v. *American Elec. Power Co.*, 54 FPC 361 (1975); *McDowell County Consumers Council* v. *American Elec. Power Co.*, 15 FERC ¶ 61,257 at 61,592-93 (1981). This Court should respect that interpretation.

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mobile "shall be deemed" to be owner's agent may be rebutted): *Bowers* v. *United States*, 226 F.2d 424, 430-33 (5th Cir. 1955) (Cameron, J., dissenting) (citing numerous state supreme court cases); *Hardy* v. *Lomenzo*, 349 F. Supp. 617, 621 (S.D.N.Y. 1972) (provision of New York's election law stating that "no voters working for the government abroad shall be deemed to have lost their residence" does not create a conclusive presumption that an out-of-state voter working for government has retained his residence); *Sanitary Milk & Ice Cream Co.* v. *Hickman*, 193 S.E. 553, 555 (W. Va. 1937) (provision in sales tax law stating that certain associations "shall be deemed nonprofit" did not create conclusive presumption).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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